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No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FRANK X. HOPKINS, WARDEN,
PETITIONER,

-vs-

RANDOLPH K. REEVES,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIÆ

The Amici Curiæ States (Amici) respectfully submit this brief in support of the Petitioner, Frank Hopkins, Warden of the Nebraska State Prison. The Amici have a strong interest in not having federal courts declare and apply new rules of federal constitutional law on federal habeas review of state convictions. The Eighth Circuit's dramatic expansion of *Beck v. Alabama*, 447 U.S. 625 (1980), requiring the giving of lesser-related homicide offense instructions in a capital felony-murder prosecution, constitutes a new rule, whose application on habeas review violates *Teague v. Lane*, 489 U.S. 288 (1989) and drastically impacts the finality interests of the Amici. The Amici also have a fundamental interest in protecting their substantive criminal law against new federal mandates; expanding *Beck* to require the giving of instructions on lesser-related homicide offenses in capital felony-murder trials would be an unwarranted intrusion into the States' substantive criminal law. The Eighth Circuit rule would drastically, and detrimentally, impact state felony-murder prosecutions, hampering the States' ability to fully prosecute some of their most dangerous criminals.

SUMMARY OF ARGUMENT

The Eighth Circuit ruled in this case that the Nebraska trial court violated *Beck* by not giving lesser-related homicide offense instructions in a capital felony-murder case. First, this holding declares and applies a new rule on habeas review, in violation *Teague*. Second, *Beck* should not be expanded to require that state courts give lesser-related homicide offense instructions in capital felony-murder cases. Expanding the federal due-process mandate is an unwarranted intrusion into the substantive criminal law of the States—this Court has long recognized that state courts are the ultimate expositors of their state criminal law. *Medina v. California*, 505 U.S. 437 (1992); *Estelle v. McGuire*, 502 U.S. 62 (1991). For these reasons, this Court should reverse the Eighth Circuit's opinion in *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996).

ARGUMENTS

I

THE EIGHTH CIRCUIT OPINION, REQUIRING THE GIVING OF LESSER-RELATED HOMICIDE OFFENSE INSTRUCTIONS IN A CAPITAL FELONY-MURDER TRIAL, DECLARES AND APPLIES A NEW RULE ON FEDERAL HABEAS REVIEW, IN VIOLATION OF *TEAGUE*.

Amici contend that the Eighth Circuit has created a new rule, and erroneously applied it on federal habeas review. The opinion dramatically expands *Beck* by requiring a state court conducting a capital felony-murder trial to give jury instructions on the *lesser-related* homicide offenses of second-degree murder and manslaughter, when those offenses are not *lesser-included* offenses of felony-murder under state law. Not only is this new rule not mandated by *Beck*, it is contrary to this Court's more recent opinions explaining the limited scope of *Beck*.

A. THIS COURT MUST DO A *TEAGUE* ANALYSIS FIRST.

Amici submit that this Court must first analyze the *Teague* issue before considering the merits.[1] That issue has been squarely presented to this Court, which granted review on Petitioner's third question—whether *Teague* applies to bar application of the rule set forth by the Eighth Circuit. The application of *Teague* "is a threshold question in a federal habeas case." *Goeke v. Branch*, 514 U.S. ___, 115 S. Ct. 1275, 1276 (1995). In this case, *Teague* "is a necessary predicate to the resolution of the [other] question[s] presented in the petition." *Caspari v. Bohlen*, 510 U.S. ___, 114 S. Ct. 948, 953 (1994). "[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." *Id.* (emphasis in original) (this Court considered *Teague* issue despite Eighth Circuit's insistence, as here, that it was merely applying existing precedent).

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1. *Teague* applies in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

B. THE EIGHTH CIRCUIT HAS CREATED A NEW RULE.

Second, *Teague* clearly bars application of the proposed new rule to this case. A new rule is announced for *Teague* purposes when "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Caspari*, 114 S. Ct. at 953 (quoting *Teague*, 489 U.S. at 301) (emphasis deleted). The *Teague* doctrine ensures respect for the finality of state convictions and to minimize the costs to the States of having to continually relitigate convictions and sentences:

> "[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague, 489 U.S. at 308–10 (quoting *Engle v. Issac*, 456 U.S. 107, 128 n.33 (1982)); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372–73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring State because States' interests in comity and finality are not diminished by applying a favorable "new rule"); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

Because Respondent came to the federal courts on collateral habeas review, he may not obtain federal relief "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 117 S. Ct. 1969, 1973 (1997); *see also Lambrix v. Singletary*, 117 S. Ct. 1517, 1525 (1997) (the issue is whether the unlawfulness of the prisoner's conviction was apparent to "all reasonable jurists"). Habeas relief is proper only if a state court considering the prisoner's claim at the time the conviction became final would have felt *compelled* by existing precedent to conclude that the rule sought was required by the Constitution. *Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996); *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

The *Teague* analysis looks at three factors: (1) when the prisoner's conviction became final; (2) whether the "legal landscape" that existed when the conviction became final was such that the state court would have

felt compelled to conclude that the prisoner's rule was mandated by the Constitution; and (3) if not compelled (meaning that the rule is a "new rule"), whether the new rule falls within one of the two exceptions to the *Teague* doctrine. *O'Dell*, 117 S. Ct. at 1973.

The first point is easily settled. Respondent's conviction became final in 1984. *See State v. Reeves*, 344 N.W.2d 433, *cert. denied*, 469 U.S. 1028 (1984).

Second, this Court must look at the legal landscape that existed back in 1984. Amici submit that there was no authority in 1984 that would have compelled a state court to adopt the rule now proclaimed by the Eighth Circuit. The relevant authority that existed in 1984 was *Beck* (issued in 1980), and *Hopper v. Evans*, 456 U.S. 605 (1982).

In *Beck*, this Court considered an Alabama statute that precluded the trial court from instructing the jurors on any lesser-included offenses once the State elected to *charge* capital murder. *Beck* emphasized that the circumstances of that case were *sui generis*:

> Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is *unique* in American criminal law.

447 U.S. at 635 (emphasis added). The precise holding was:

> [A] sentence of death [may not] constitutionally be imposed after a jury verdict of guilt in a capital case, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict.

447 U.S. at 627.

It is worth noting that *Beck*, in discussing the law of states (other than Alabama) that permit the giving of lesser-included offense instructions in appropriate circumstances, cited *State v. Valencia*, 589 P.2d 434 (1979). 447 U.S. at 636 n.12. *Valencia* was an Arizona capital-murder case, charged as felony-murder, in which the trial court's refusal to give a second-degree murder instruction was affirmed because the evidence

showed that the killing occurred in the course of one of the felonies enumerated in the murder statute, and, under state law, there were no lesser-included offenses of felony murder.[2] 589 P.2d at 441.

Thus, *Beck* contains no indication whatsoever that states would violate the Due Process Clause by not giving *lesser-related* homicide offense instructions in felony-murder cases. *Beck* simply addressed the peculiar situation of a state statute forbidding, in capital cases only, any *lesser-included* offense instructions, when such lesser-included offenses existed under state law.

In *Hopper v. Evans*, this Court simply held that the Alabama statute considered in *Beck* had not deprived the defendant of a fair trial when a lesser-included offense instruction was not warranted by the evidence. 456 U.S. at 612–14. It held that "a *lesser included* offense instruction [need] be given *only* when the evidence warrants such an instruction." 456 U.S. at 611 (emphasis in original).

Thus, both *Beck* and *Hopper* were concerned with an extraordinary statute; no other state had a similar statute. Neither opinion says *anything* about state trial courts being required to give *lesser-related* homicide offense instructions (when there are none under state law) in felony-murder prosecutions; they discuss only *lesser-included* offense instructions based on lesser-included homicide offenses that were recognized by Alabama law. Therefore, in 1984, there was no constitutional mandate from this Court to follow the rule set forth by the Eighth Circuit. In other words, a jurist considering all the relevant authority in 1984 could reasonably have reached a conclusion contrary to the Eighth Circuit's rule.

Indeed, the Ninth Circuit, in *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992), specifically rejected the proposed rule.[3] *See also Hill v. Kemp*, 833 F.2d 927, 929

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2. The Arizona Supreme Court, in *State v. Greenawalt*, 624 P.2d 828, 846, *cert. denied*, 454 U.S. 882 (1981), subsequently quoted that portion of *Valencia*, and held that second-degree murder instructions were not required in a felony-murder case.

3. After the Eighth Circuit issued its opinion, the Ninth Circuit was again presented with the issue in *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S. Ct. 794 (1997), when Greenawalt urged the court to recall its mandate because of *Reeves*. The Ninth Circuit declined to recall the mandate, stating "*Reeves* does not persuade

(11th Cir. 1987) (defendant was convicted of murder and forcible rape, no error in not instructing jurors on statutory rape in view of Georgia Supreme Court holding that statutory rape is not a lesser-included offense of forcible rape—a federal court must follow a state court's decision on whether a defendant could be convicted of a lesser-included offense in deciding whether the failure to give a lesser-included offense instruction violates due process); *United States v. Beckford*, 966 F. Supp. 1415, 1432–33 (E.D. Va. 1997) (holding that *Beck* did not require Congress to create any lesser-included homicide offenses to federal crime of intentional murder in furtherance of a continuing criminal enterprise—"*Reeves* is not persuasive"). That a result is not so obvious that a court would have felt compelled to reach it can be demonstrated by a split between the federal circuit courts. *See Butler*, 494 U.S. at 415.

Furthermore, opinions from this Court after 1984 certainly indicate that a reasonable jurist, in 1984, would not have thought the Eighth Circuit rule was mandated by *Beck*. The most important case to understanding the scope of *Beck* is *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), in which, *under Florida law*, the charge of first-degree murder included the lesser charges of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter. 468 U.S. at 450. However, the statute of limitations had run on those offenses and the defendant refused to waive the statute to obtain the instructions, so the trial court instructed the jurors only on first-degree murder. *Id.* Spaziano argued to this Court that *Beck* required that the lesser-included offense instructions be given, without his having to waive the statute of limitations. This Court rejected the argument:

> Petitioner would have us divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. *Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result.*

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us that we erroneously resolved Greenawalt's *Beck* claim." 105 F.3d at 1276.

468 U.S. at 455 (emphasis added). This Court added:

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

468 U.S. at 455–56. It cautioned that *Beck* does not require the trial court to "trick" the jury by giving instructions on lesser included-offenses on which no conviction could actually occur. 468 U.S. at 456.

Spaziano raises two points important to this case. First, it emphasizes that when a federal court considers whether due process requires giving lesser-included offense instructions, the availability of lesser-included offenses is determined by state law. If no lesser-included offenses are available under state law, *Beck* does not require instructions on them, even though it leaves the jurors with no options other than capital conviction or acquittal. In *Spaziano*, there were no available lesser-included homicide offenses under Florida law because the statute of limitations had run; in this case, there were no available lesser-included homicide offenses under Nebraska law because second-degree murder and manslaughter are not lesser-included offenses of felony-murder. Second, *Spaziano* again shows that *Beck* is only concerned with the availability of *lesser-included* offenses, as opposed to *lesser-related* offenses. *Beck* does not require States that have no lesser-included homicide offenses under state law to change their law to require instruction on lesser-related homicide offenses.

The only other opinion in which this Court has considered the constitutional necessity of lesser-included offense instructions was *Schad v. Arizona*, 501 U.S. 624 (1991). In that case, the state charged the defendant with first-degree murder, and proceeded on both premeditated and felony-murder (the underlying felony was robbery) theories. The trial court instructed the jurors on first-degree murder and second-degree murder[4], but refused to instruct the jurors on robbery, which the defendant

4. The jurors were instructed on second-degree murder because it is a lesser-included offense of first-degree, premeditated murder. *See State v. Whittle*, 752 P.2d 489, 493 (Ct. App. 1985), *approved as modified on other grounds*, 752 P.2d 494 (1988). Second-degree murder is not a lesser-included offense when the first-degree murder charged is based solely on a felony-murder theory. *State v. Martinez-Villareal*, 702 P.2d 670, 675–76, *cert. denied*, 474 U.S. 975 (1985). Under Arizona law, the jurors are to be given

characterized as a lesser-included offense of a felony-murder theory based on a robbery. 501 U.S. at 645. Schad argued to this Court that the due process principles underlying *Beck* required that a jury in a capital case be instructed "on *every* lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case." *Id.* (emphasis added.) This Court found no *Beck* violation because the jurors were instructed on second-degree murder, and held that *Beck* does not require instruction on all lesser-included offenses. 501 U.S. at 646–48.

Thus, *Schad* appears to further limit *Beck* to its unusual factual situation. Once again, it discusses *Beck* only in the context of lesser-included offenses. In this case, by contrast, the Eighth Circuit's opinion did not turn on giving instructions on *lesser-included offenses*; it had no dispute with the principle of state law that second-degree murder and manslaughter are not lesser-included offenses of felony-murder under Nebraska law. *Schad* also makes clear that the Eighth Circuit, at the very least, erred in holding that *Beck* required the Nebraska trial court to instruct on both second-degree murder *and* manslaughter. *Schad* in no way indicates that *Beck* requires the result reached by the Eighth Circuit in this case.[5]

Accordingly, reading *Spaziano* and *Schad* together, a reasonable jurist deciding this case in 1984 would not have felt compelled by *Beck* to hold that state courts are required to give lesser-related homicide offense instructions in capital felony-murder cases, when there are no lesser-included homicide offenses to felony-murder under state law. Thus, the

verdict forms on all offenses "necessarily included in the offense charged." Rule 23.3, Ariz. R. Crim. P. They are not to be instructed on lesser-related offenses, which have been defined as "offenses supported by the facts of the case, although not included in the charging document." *State v. West*, 862 P.2d 192, 203–04 (1993), *cert. denied*, 511 U.S. 1063 (1994).

5. Admittedly, *Schad* did not consider the issue here, whether lesser-related homicide offense instructions have to be given when there are no lesser-related homicide offenses under state law. The dissent took the position that due process required the giving of an instruction on the underlying felony, robbery. 501 U.S. at 661. However, even the dissent recognized "[i]t is true that the rule in *Beck* only applies *if there is in fact a lesser included offense to that with which the defendant is charged, for 'where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process.'*" 501 U.S. at 661 (White, J. dissenting) (emphasis added). Thus, even assuming *arguendo* that the dissent's position was correct, Respondent was entitled only to an instruction on the underlying felony, but he did not request an instruction on that offense. (Petition at 18.)

Eighth Circuit has not followed the mandate of *Beck*, but rather created an entirely new constitutional mandate. Hence, despite its stated reliance on *Beck*, the Eighth Circuit has announced and applied a "new rule" on habeas review, in violation of *Teague*.

C. NEITHER OF THE TWO *TEAGUE* EXCEPTIONS APPLY.

Finally, neither of the two *Teague* exceptions apply to the Eighth Circuit's new rule. *Teague* sets forth only two exceptional situations in which a new rule may be applied retroactively in a habeas proceeding:

> Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'." This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in [*Reeves*]. Nor did [*Reeves*] address any "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders.

Butler, 494 U.S. at 415 (discussing retroactivity of new rule stated in *Arizona v. Roberson*, 486 U.S. 675 (1988) (citations omitted). The first *Teague* exception obviously does not apply here—the state's proscription of murder is not altered.

"The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990). Although *Beck* sought to enhance the reliability of capital proceedings, which is presumably the intention of the Eighth Circuit's extension of *Beck* in this case, this Court pointed out in *Sawyer* that, "A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Id.* at 242 (emphasis in original). Indeed, at least one federal circuit court has held that *Beck* itself is not a watershed rule. *Andrews v. DeLand*, 943 F.2d 1162 (10th Cir. 1991), *cert. denied*, 503 U.S. 967 (1992).

A fortiori, the Eighth Circuit rule expanding *Beck* does not "alter our understanding of bedrock procedural elements." First, this Court has never held lesser-included offense instructions are constitutionally required in non-capital cases. *Beck*, 447 U.S. at 638 n.14. Second, the giving of lesser-included offense instructions arose as an aid to, and often is considered more beneficial to, the prosecution. *Beck*, 447 U. S. at 633; *Spaziano*, 468 U.S. at 456. Third, this Court in *Spaziano* found no contradiction in *Beck* to the "general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial" in holding that Spaziano was properly required to elect between waiving his statute of limitations defense and receiving lesser-included offense instructions in his capital case. 468 U.S. at 455–57.

Accordingly, no "bedrock procedural element essential to the fairness of a proceeding" is contained in the Eighth Circuit's newly-minted rule. Therefore, the Eighth Circuit's attempted expansion of *Beck* does not fall within either of the two *Teague* exceptions, and there is no persuasive reason why *Teague* should not be applied to bar application of a new rule to this case.

II

TO REQUIRE THE GIVING OF LESSER-RELATED HOMICIDE OFFENSE INSTRUCTIONS IN CAPITAL FELONY-MURDER PROSECUTIONS WOULD BE AN UNWARRANTED INTRUSION INTO THE STATES' SUBSTANTIVE CRIMINAL LAW.

The Eighth Circuit has declared that the Due Process Clause of the Fourthteenth Amendment mandates that lesser-related homicide offense instructions be given in all capital-felony murder prosecutions, when the evidence supports the lesser-related offenses. This newly-created mandate flies in the face of the fact that the overwhelming majority of states have adopted the rule that juries are to be instructed only on lesser-included offenses, not lesser-related offenses. This new constitutional mandate is an unprecedented intrusion into state substantive criminal law, and especially into capital felony-murder prosecutions. *Beck* does not warrant this massive intervention, which will unduly "federalize" the States' substantive criminal law.

A. STATE COURTS AND LEGISLATURES ARE THE ULTIMATE EXPOSITORS OF STATE LAW.

First, it is important to recount this Court's pronouncement that:

> [P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government [citation omitted], and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Patterson v. New York, 432 U.S. 197, 201 (1977). *Accord, Medina v. California*, 505 U.S. 437, 445 (1992); *Martin v. Ohio*, 480 U.S. 228, 232 (1987). The States have considerable expertise in matters of criminal procedure, and their criminal justice systems are grounded in centuries of common-law tradition. *Medina*, 505 U.S. at 445. As this Court stated in *Spencer v. Texas*, 385 U.S. 554, 564 (1967):

> [I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.

Accord, Estelle v. McGuire, 502 U.S. 62, 70 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("declining to reexamine the state rule that intentional or criminally reckless killings are aspects of the single crime of felonious homicide"). In *Powell v. Texas*, 392 U.S. 514, 535–36 (1968), this Court stated that it "has never articulated a general constitutional doctrine of *mens rea*," explaining:

> The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

392 U.S. at 536. *Schad*, 501 U.S. at 636, states, "it is a fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts." (citing *Mullaney v. Wilbur*).

B. THE EIGHTH CIRCUIT HAS ABANDONED THE UNIVERSALLY-ACCEPTED LESSER-INCLUDED OFFENSE DOCTRINE AND MANDATED THE LESSER-RELATED OFFENSE DOCTRINE, A DOCTRINE THAT HAS BEEN ALMOST UNIFORMLY REJECTED BY THE STATE COURTS.

The Eighth Circuit, without explicitly recognizing the impact of its decision, has held that due process, at least in capital cases, requires the giving of lesser-related homicide offense instructions when there are no lesser-included homicide offenses as a matter of state law. This appears to be the first time that a federal court has mandated that states follow the lesser-related offense doctrine, which is substantially different from the well-established lesser-included offense doctrine.

The lesser-included offense doctrine was developed at early common law and has been universally accepted in this country. *See Schmuck v. United States*, 489 U.S. 705, 717 n.9 (1989); *Beck*, 447 U.S. 625, 633–37 (1980); *see generally*, James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQUETTE L. REV. 1, 6 (1995) (hereinafter Shellenberger and Strazzella). Under this doctrine, the trial judge must instruct the jurors on all charged offenses and all lesser-included offenses that are supported by the evidence. Shellenberger and Strazzella, at 6. In deciding what lesser-included offense instructions must be given, the trial court determines what offenses are lesser-included offenses of the charged crime by looking at the elements of the offenses, and then determines if the evidence presented at trial supports those lesser-included offenses. *Schmuck*, 489 U.S. at 718–19.

By contrast, only a handful of States have accepted the lesser-related offense doctrine; the great majority have flatly rejected it.[6] The lesser-

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6. The States rejecting the lesser-related offense doctrine are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. *See*

related offense doctrine requires instruction on offenses "bearing a recognizable relationship to the charged offense and punishable to a lesser degree." Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4th 1081, 1087 n.3 (1986)

C. A CONSTITUTIONALLY-MANDATED LESSER-RELATED OFFENSE DOCTRINE WOULD UNDULY INTERFERE WITH THE PROVINCE OF THE STATES AND WOULD BE UNWORKABLE.

For a state criminal procedure to be proscribed by the Due Process Clause, it must "offend some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Patterson*, 432 U.S. at 202. The state laws proscribing the giving of lesser-related offense instructions do not offend fundamental principles, and therefore may not be cast aside under the guise of due process.

As discussed above, the lesser-included offense doctrine has been universally accepted by the States. Nevertheless, with the limited exception set forth in *Beck*, this Court has never made the lesser-included offense doctrine a federal constitutional mandate.[7] If it did, it would "open up significant federal court interference in state court proceedings," because lesser-included offense instructions are, to some extent, an issue in every criminal trial. Shellenberger and Strazzella, at 111. For obvious reasons, this Court has declined to take this dramatic step.

The Eighth Circuit has mandated a completely new constitutional requirement by mandating lesser-related offense instructions. This Court has never adopted the lesser-related offense doctrine as any sort of constitutional mandate. Indeed, with respect to federal prosecutions, this Court has mandated use of the "elements" test under the lesser-included offense doctrine. *Schmuck*, 489 U.S. at 716. The Eighth Circuit's opinion requires sober consideration of its new mandate's effect on the States.

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generally Annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 A.L.R. 4th 1081, 1096–1106 (1986). The States apparently following the lesser-related offense doctrine are California, Michigan, Nevada (in non-capital murder cases only, open question if applicable in capital murder cases), New Jersey, and Utah. *Id.* at 1114–1116.

7. One circuit, the Third Circuit has held that *Beck* requires giving of lesser-included offense instructions in non-capital cases. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1026–27 (3d Cir. 1988) (in non-capital murder case, trial judge erred by not instructing jurors on aggravated assault).

One question is whether the lesser-related offense requirement would be limited to capital cases. Indeed, most federal circuits have declined to extend *Beck* beyond capital cases, but the Third Circuit has done so. *See Vujosevic*, 844 F.3d at 1026 (holding that trial court violated due process by not giving aggravated assault instruction in non-capital murder case). If the lesser-related offense doctrine is allowed to establish a foothold in due process jurisprudence, other courts will no doubt expand its application to non-capital situations, thereby further invading the province of state substantive criminal law.

Even if limited to capital cases, the lesser-related offense doctrine will require substantial changes in state law, and federal interpretations of state law. As discussed above, all States are familiar with the lesser-included offense doctrine. Therefore, by constitutionally mandating lesser-related offense instructions, the Eighth Circuit is forcing upon the great majority of states a concept previously unknown in their criminal law. Moreover, if the new rule is adopted, federal courts will be in the business of telling state courts how to do a lesser-related offense analysis (something federal courts do not do in federal prosecutions[8]), and deciding what offenses are lesser-related offenses of charged crimes. This project would be challenging for state courts intimately familiar with their own criminal codes; it would be nearly impossible for federal courts much less familiar with state criminal codes. Furthermore, unlike the fairly mechanical "elements" test for lesser-included offenses, the test for lesser-related offenses verges on the mystical. The extent of such a widespread intrusion into state criminal law would be breathtaking.

Even if the federal courts were willing to undertake this broad intrusion into state law, Amici submit that the lesser-related test is patently unworkable. There is an eerie feeling that we have come this way before. For many years, this Court's double-jeopardy analysis consisted of the "identical elements" standard adopted in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The *Blockburger* elements test "inquires whether each offense contains an element not contained in the other;" where each offense contains an element not contained in the other, they are not the "same offense," and the Double Jeopardy Clause provides no bar to

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8. As noted previously, this Court held in *Shmuck* that federal courts are not required to give lesser-related offense instructions in federal cases, under Rule 31(c), Federal Rules of Criminal Procedure. 489 U.S. at 716.

multiple punishments or successive prosecutions. *United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849, 2856 (1993). However, in *Grady v. Corbin*, 495 U.S. 508, 510 (1990), this Court expanded the analysis to include, not only actions for offenses containing the same elements (the *Blockburger* test), but also actions for offenses involving the same *conduct*. A mere 3 years after *Grady* was issued, the proven impracticality of the expanded analysis persuaded this Court to abandon the *Grady* test and return to the *Blockburger* test. *Dixon*, 113 S. Ct. at 2856. Amici submit that the Eighth Circuit's lesser-related offense analysis, which abandons the familiar and well-established elements test of the lesser-included offense doctrine (similar to the *Blockburger* elements test), would be at least as untenable as the *Grady* rule proved to be.

D. THE OPINION CASTS DOUBT ON THE VIABILITY OF CAPITAL FELONY-MURDER PROSECUTIONS.

Another problem with the Eighth Circuit's opinion is the doubt it casts on the viability of state capital felony-murder prosecutions. The Eighth Circuit opinion, while purporting to be a straightforward application of *Beck*, also casts a chill on the States' seeking the death penalty in felony-murder prosecutions. The opinion attempts to reassure the State of Nebraska (and other States) that "There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction." 102 F.3d at 984. It later states, "We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction." 102 F.3d at 984. The opinion "doth protest too much." These statements will have a chilling effect on the States' use of the felony-murder theory in capital cases. The only way state prosecutors can avoid the quandary of when and what lesser-related offense instructions need to be given is by not seeking the death penalty in felony-murder cases. As the Eighth Circuit states, "Nebraska's rationale for prohibiting lesser included offense instructions disappears when the defendant is sentenced to death." 102 F.3d at 984. In other words, the Eighth Circuit is advising state prosecutors that they can avoid the new constitutional mandate by not seeking the death-penalty in felony-murder prosecutions.

The felony-murder rule is a long-accepted and widely-adopted principle in the States' substantive criminal law. As Justice Scalia stated in his concurring opinion in *Schad*, the felony-murder theory has been around

"since at least the early 16th century." 501 U.S. at 648. His opinion also noted that a 1794 Pennsylvania felony-murder statute had "been widely copied, and down to the present time the United States and most states have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing." 501 U.S. at 649.[9]

As discussed above, although proclaiming no inherent unconstitutionality in prosecutions under the felony-murder theory, the Eighth Circuit opinion raises practical concerns about such cases that may deter state prosecutors from such prosecutions. The opinion assures Nebraska that lesser-related offenses need only be given when they are supported by the evidence. 102 F.3d at 985. The initial problem for the trial court will be, as discussed previously, what offenses are "lesser-related offenses." Having solved that puzzle, the trial judge will have to divine whether there is sufficient evidence to support a conviction on those lesser-related offenses. The practical effect will be that the trial judge, not wanting to be reversed on appeal and required to try the case again, will err on the side of giving second-degree murder or manslaughter instructions, even if sufficiency of the evidence on those charges is questionable. Thus, state prosecutors will be exposed to the risk that the jurors will find the defendant guilty on a charge that is not supported by the evidence.

Hopefully, in the face of arguments that there is no evidence to support the lesser-related charges, the jurors will not find the defendant guilty on them, but there is always a possibility that the jurors will compromise on the verdict, despite the evidence. This, despite the Eighth Circuit's pronouncement that *Spaziano* stands for the "eminently sound notion" that "juries should not be mislead [sic] into 'convicting someone of a charge for which he or she cannot be convicted'." 102 F.3d at 984.

After trial, the defendant will no doubt file a post-trial motion for a judgment of acquittal because there is no evidence to support the conviction, *and*, if the jurors have in fact compromised to reach a verdict

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9. Moreover, before a sentence of death can be imposed in a felony-murder case, an *Enmund/Tison* finding must be made. *See Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

that is not supported by the evidence, the defendant *will be entitled to an acquittal*. If no post-trial motion is filed, or the judge denies the motion, the defendant will argue on appeal that there is no evidence to support the conviction. Once again, he will be right and the appellate court will vacate the conviction because there is *no evidence to support it*. *See also State v. Handley*, 585 S.W.2d 458, 463 (Mo. 1979) (conviction for second-degree murder reversed for insufficiency of the evidence lack of jurisdiction—state charged first-degree murder, so trial court had no jurisdiction under the Missouri constitution to submit the crime of second-degree murder to the jurors because second-degree murder is not a lesser-included offense of first-degree felony-murder under Missouri law), *overruled*, *State v. Wilkerson*, 616 S.W.2d 829, 833 (Mo. banc 1981). Thus, in such compromise-verdict situations, the ultimate result will be that the defendant will be completely absolved of any homicide offense, *despite the uncontested fact that he or she participated in murdering someone*. *See Handley*, 585 S.W.2d at 465 ("[W]e reverse the judgment and order that the defendant be discharged").

Because the felony-murder theory has been so well-accepted and widely-adopted in American jurisdictions, to allow the Eighth Circuit's intrusion into state felony-murder prosecutions would be an unprecedented intrusion into the homicide laws of the States—putting at risk their ability to prosecute some of the most dangerous persons in their jurisdictions.[10]

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10. For instance, Arizona has long relied upon the felony-murder theory in capital prosecutions, in conjunction with the principle that there are no lesser-included or lesser-related homicide instructions that need be given in such prosecutions. The Ninth Circuit has declined to interfere with Arizona's substantive criminal law under the guise of *Beck*:

> Greenawalt contends that the trial court erred by failing to instruct the jury on second degree murder or any lesser included offense. He correctly observes that due process requires such an instruction when the evidence warrants it. *Beck v. Alabama*, 447 U.S. 625, 636–37, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980). He fails to point out the Supreme Court's subsequent clarification that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S. Ct. 3154, 3159, 82 L. Ed. 2d 340 (1984). Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense. *Greenawalt I*, 624 P.2d at 846. . . . Here, the trial court committed no error.

Greenawalt, 943 F.2d at 1029.

E. *BECK* DOES NOT SUPPORT THIS INTRUSION INTO STATE SUBSTANTIVE CRIMINAL LAW.

Amici submit that *Beck* does not support the substantial intrusion into state law discussed above. Amici recognize that the Due Process Clause places certain limits on the States' ability to define the elements of a crime.[11] Amici, however, submit that the Due Process Clause does not give federal courts *carte blanche* to fundamentally alter the *mens rea* concept embodied in the felony-murder doctrine and the concept of lesser-included homicide offenses. *See Powell*, 392 U.S. at 535–36. The Eighth Circuit has held that Nebraska's substantive-law choice in felony-murder prosecutions —not allowing second-degree murder and manslaughter instructions that will divert the jurors from the appropriate *mens rea* considerations—is unconstitutional under *Beck*.

The ultimate question is whether *Beck* forbids States from enacting capital offenses that contain no lesser-included homicide offenses. Amici submit that *Beck* does not mean, and this Court has never construed it to mean, that a state legislature may only create capital offenses that contain lesser-included homicide offenses. *See Beckford*, 966 F. Supp. at 1430. This Court's opinions construing *Beck*, discussed earlier in this brief, have demonstrated a tendency to restrict, rather than to extend, *Beck*. *Id.* The rationale of *Spaziano* reflects the reluctance of this Court to extend *Beck* to cases in which lesser-included offenses do not exist. 966 F. Supp. at 1433. One court has nicely summed up the distinction between *Beck* and cases such as this one:

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11. While it is true that *Beck*, in a limited manner, rewrote Alabama substantive law based on the Due Process Clause, that intrusion had limited effect on the laws of other states because the Alabama procedure at issue was "unique in American criminal law." 447 U.S. at 635. Moreover, the Alabama statute at issue was essentially flawed in a second respect, it had many of the same *mandatory death-penalty flaws that this Court found* unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *Beck*, 447 U.S. at 639.

By contrast, the constitutionality of felony-murder statutes has never been questioned by this Court, and felony-murder has widely been adopted as one theory of capital prosecution. Thus, the Eighth Circuit's pronouncements impinge upon criminal justice in a great number of states.

> [I]n *Beck*, the defendant sought a rule, pursuant to which, defendants may not be precluded from benefitting from an instruction on an offense which had either been created by the legislature or which existed under state law. Here, however, the defendants seek a rule, pursuant to which, the judiciary would circumscribe legislative discretion in the *creation of offenses* by requiring the legislature to create alternatives for conviction.

966 F. Supp. at 1433. That same court stated, "[T]here is no warrant in the Constitution, a document which rests of principles of federalism, for requiring that, once Congress chooses to exert jurisdiction over the most serious capital offenses with a federal nexus, it must exert jurisdiction over all other lesser included offenses." *Id.*

In view of the principles of comity and federalism that have led to federal-court deference to the States in matters of state substantive criminal law, there is no constitutional warrant requiring that state legislatures provide for lesser-included homicide offenses when they enact felony-murder statutes. The creation of state criminal laws, and the elements of those laws, is one of the most basic state functions. *Beck* neither mandates that state legislatures provide for lesser-included homicide offenses when enacting felony-murder statutes, nor that federal courts manufacture lesser-related homicide offenses for felony-murder.

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(1)

No. 96-1693

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FRANK X. HOPKINS, Warden,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

I.

MAY A FEDERAL COURT REQUIRE A STATE COURT, IN A FIRST-DEGREE MURDER CASE BEING PROSECUTED UNDER A TRADITIONAL FELONY MURDER THEORY, TO IGNORE STATE SUBSTANTIVE LAW AND INSTRUCT ITS GUILT PHASE JURIES ON LESSER HOMICIDE OFFENSES THAT HAVE NEVER BEEN RECOGNIZED AS LESSER INCLUDED OFFENSES OF FIRST-DEGREE FELONY MURDER, IN ORDER TO SATISFY THIS COURT'S RULING IN *BECK v. ALABAMA*?

II.

DOES THE OPINION OF THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS*, 102 F.3d 977 (8th CIR. 1996) CREATE A DIRECT CONFLICT WITH THE NINTH CIRCUIT IN *GREENAWALT v. RICKETTS*, 943 F.2d 1020 (9th CIR. 1991)?

III.

IS THE RULE ANNOUNCED BY THE EIGHTH CIRCUIT A "NEW" RULE UNDER *TEAGUE v. LANE*, 489 U.S. 288 (1989)?

INTERESTED PARTIES

Other than the parties named in the caption of the case, the following are also interested parties:

States' Attorneys General as *Amicus Curiae*

United States as *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

[1]*Amicus*, in compliance with S.Ct.R. 37.2(a), has filed letters from petitioner and respondent consenting to its submission of this brief on behalf of the respondent. In compliance with S.Ct. R. 37.6, no person other than *amicus* made a monetary contribution to the preparation or submission of the brief. Further, the brief was not written in whole or in part by counsel for a party.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958. NACDL is affiliated with 68 state and local criminal defense organizations and works cooperatively with them on issues related to criminal defense. Thus, NACDL speaks for more than 28,000 criminal defense lawyers nationwide.

NACDL seeks to promote the fair administration of criminal justice through adherence to the Bill of Rights. If generally seeks to improve the quality of the American system of justice.

The interest of *amicus* in this case is two-fold. First, *amicus* is concerned that issues in capital cases be exhaustively researched and briefed because death is indeed different. Second, this Court has asked the parties to address the weighty issue of the respective powers of the states and federal government to define the elements of capital cases. *Amicus* believes that this issue is not presented by the case under review and should not be decided.

SUMMARY OF ARGUMENT

The principal question presented by the petition implies that the lower court's ruling is an unwise and unjustifiable extension of this Court's holding in *Beck v. Alabama*. In fact, this case is on all fours with *Beck*. Both cases are based on the Eighth Amendment principle that when a defendant is clearly guilty of some serious, violent crime, state law cannot prohibit giving the jury instructions on lesser included offenses. A jury verdict is inherently unreliable when it rests on an all-or-nothing choice between convicting such a defendants of a capital crime or not convicting him at all. This unreliability is unacceptable in cases where the ultimate penalty is imposed, whether the state law prohibiting the instruction is based on statute, as in *Beck*, or on state court rulings, as in this case. Thus, the lower court's ruling is a straight-forward application of *Beck*; it does not require federal courts to "ignore state substative law," nor does it implicate a due process right to lesser-included instructions.

Thus, once *Beck* is understood to govern the issue in this case, there is no split between the Eighth and Ninth Circuits. There is, rather, confusion as to whether *Spaziano v. Florida*, 468 U.S. 447 (1984), is an extension of *Beck* or an exception. This confusion may be resolved by a mere clarification that *Beck's* theoretical basis is the Eighth Amendment which looks to the ***effect*** of state laws on the deliberative process in capital cases and not to any of a variety of potential ***causes*** of irrational decision making.

The Eighth Circuit therefore created no "new" rule under *Teague v. Lane*, 489 U.S. 288 (1989), since it merely applied *Beck*. Even if *Reeves* could be understood as superimposing a new federal procedural requirement on state law, the state waived any *Teague* bar by failing to raise it in the district court. Moreover, this Court has never held that *Teague* applies where a purportedly new rule is announced during the regular course of habeas review where the "new" rule would otherwise constitute binding precedent.

ARGUMENT

I.

MAY A FEDERAL COURT REQUIRE A STATE COURT, IN A FIRST-DEGREE MURDER CASE BEING PROSECUTED UNDER A TRADITIONAL FELONY MURDER THEORY, TO IGNORE STATE SUBSTANTIVE LAW AND INSTRUCT ITS GUILT PHASE JURIES ON LESSER HOMICIDE OFFENSES THAT HAVE NEVER BEEN RECOGNIZED AS LESSER INCLUDED OFFENSES OF FIRST-DEGREE FELONY MURDER, IN ORDER TO SATISFY THIS COURT'S RULING IN *BECK v. ALABAMA*?

A. This case presents no issue requiring an extension of *Beck v. Alabama*.[2] Rather, the Eighth Circuit's holding in *Reeves v. Hopkins* should be affirmed because it correctly understands that the gravamen of *Beck* is limited to the Eighth Amendment's concern with the reliability of a jury verdict in capital cases, and not any due process right to lesser included instructions. Nor does *Reeves* even address a state's prerogative to

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[2]*Beck v. Alabama*, 447 U.S. 625 (1980).

determine its own criminal law.

In *Beck v. Alabama*, 447 U.S. 625 (1979), this Court recognized that in cases in which the death penalty has been imposed, the Eighth Amendment requires invalidation of state rules that operate to diminish the reliability of the guilt determination: " [W]hen the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction". *Id.* at 637, *citing Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). In capital cases, the concern with consistency and reliability of the decision making process has always been the province of the Eighth Amendment. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738 (1990); *Furman v. Georgia*, 409 U.S. 902 (1972).

At issue in *Beck* was an Alabama death statute that prohibited a trial judge from giving the jury the option of convicting a defendant of a lesser included, non-capital offense. This Court reasoned that a jury verdict was inherently unreliable when it resulted from an all-or-nothing choice between convicting a defendant of the capital crime or convicting him of no crime, where the evidence clearly established guilt of *some* serious, violent crime, was inherently unreliable. *Id.* at 637. This Court did *not* hold that the Alabama statute prohibiting instructions on lesser included offenses was unconstitutional; nor did it hold that states were required to enact new statutes or craft new common law lesser included offenses where none had existed

in order to satisfy some new due process entitlement. Rather, this Court targeted *convictions* resulting from capital prosecutions based on a single theory of guilt where all other theories of guilt supported by the evidence were *per se* proscribed. "...[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted *conviction*, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case". *Id.* at 638 (emphasis added).

Beck's concern that convictions in capital cases be reliable predicted the result in *Spaziano v. Florida*, 468 U.S. 447 (1984), in which this Court both reaffirmed that "*Beck* made clear that in a capital trial a lesser included offense instruction is a necessary element of a constitutionally fair trial", *id.* at 455, and held that a guilty verdict in a capital case would necessarily be unreliable if the trial judge misled the jury as to state law.

This Court to date has held neither that a capital defendant is constitutionally entitled to lesser included instructions-- thus requiring states to revise any offending law-- nor that states cannot enact statutes which would permit imposition of the death penalty without also permitting a guilt-phase jury to consider lesser included non-capital offenses. Nor does this case require this Court to address the issue posed by this Court to the parties in this case, thus extending *Beck*, because the prohibition in Nebraska case law operated to present the jury with precisely the same all-or-nothing dilemma in this case as was presented in *Beck*. *See Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996)("The

unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible")(emphasis in original). *Indeed, the State in its brief before this Court urges this Court to restrict its analysis in this case to Eighth Amendment capital jurisprudence. See* Pet. Br. at 33-34.[3]

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[3]The courts of appeals are split as to whether *Beck* recognizes an Eighth Amendment right to the most reliable possible verdict or a due process right to instruction on lesser included offenses. *Compare Wingerfall v. Jones*, 918 F.2d 1544 (11th Cir. 1990)(due process violated by trial court's failure to instruct on lesser included offense) *with Bagby v. Sowders*, 894 F.2d 792 (6th Cir. 1990)(holding that *Beck* is grounded in Eighth Amendment concerns, not due process). This theoretical ambiguity was presaged by Fifth, Eighth and Ninth Circuit law which, even before *Beck* was decided, had held that federal courts have no habeas jurisdiction to review refusals to instruct on lesser included offenses in non-capital cases. *See Bonner v. Anderson*, 517 F.2d 135, 136 (5th Cir. 1975); *Cooper v. Campbell*, 597 F.2d 628 (8th Cir. 1979); *James v. Rease*, 546 F.2d 325 (9th Cir. 1976). Since *Beck*, however, the Third, Sixth and Seventh Circuits have held that federal courts do have jurisdiction under the due process clause to review state lesser included instruction refusals. *See Bishop v. Mazukiewicz*, 634 F.2d 724 (3d Cir. 1980); *Brewer v. Overberg*, 624 F.2d 51 (6th Cir. 1980); *Davis v. Greer*, 675 F.2d 141 (7th Cir. 1982).

In short, this case is on all fours with *Beck* and should be decided under *Beck*. There were only two issues in this trial--whether the "penetration" necessary for first degree attempted or actual sexual assault occurred, *see* Neb. Rev. Stat. § 28-318(6)(Reissue 1989)[4], and whether Reeves was intoxicated to the point of being unable to form the requisite specific intent to commit the attempted or actual sexual assault. *See State v. Reynolds*, 235 Neb. 662, 665, 457 N.W.2d 405, 406 (Neb. 1990), *citing* William LaFave & Alan Scott, *Substantive Criminal Law* § 4.10 at 551, 554 (West 1986). These issues, both implicating the state's burden of proof, were placed before the jury, *see* J.A. at 12-25, but the jury was afforded no avenue to find what the evidence showed: that Reeves had killed his victims but that he had been so intoxicated that he either could not have accomplished the physical act of attempting to or succeeding in penetrating his first victim or could not have formulated the specific intent to commit sexual assault.

That the jury did in fact convict Reeves of felony murder rather than acquit him is the more likely because Reeves admitted facts sufficient to find that he had committed the homicides yet the evidence of a sexual penetration of

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[4]The crime of sexual assault in the first degree differs from the crime of sexual assault in the second degree in the additional element of penetration. *State v. Tamburano*, 201 Neb. 703, 704, 271 N.W. 2d 472, 473.

Janet Mesner was not overwhelming[5] while Reeves' condition, on the other hand, clearly indicated nearly senseless intoxication.[6] *See Villafuerte v. Lewis*, 75 F.3d 1330, 1338 (9th Cir. 1996)(even though Arizona law recognized no lesser included offense of felony murder/kidnaping, where there was sufficient evidence to support defense of intoxication, it was "essential" that a lesser included offense of the underlying felony be given i.e. unlawful imprisonment); *cf. Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995)(no *Beck* violation where the evidence of intoxication was minimal and would not have warranted a lesser included instruction under state law).

Indeed, this case presents an even greater risk of an unreliable verdict than that presented in *Beck*. Beck admitted that he had robbed his victim but denied that he had killed him or intended to kill him. Because the evidence tended to support this defense, the Alabama prohibition against convicting on anything less than intentional murder operated

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[5]The secretions in her vagina were determined to be merely *consistent* with intercourse having occurred; there was no evidence of semen anywhere, for example, or signs of forced penetration.

[6] That Reeves was intoxicated to the point of insensibility is overwhelmingly supported by evidence of his having left his wallet and clothing at the scene and of his wandering half-naked in the streets in forty degree weather following the commission of two brutal murders.

to create deep division among the jurors and therefore a great likelihood that the verdict was in reality compromised. In this case, Reeves admitted sufficient facts as to the killings but contested his capacity to form the intent to commit the underlying felony. Because of the gruesome, inflammatory, and overwhelming evidence of Reeves' participation in the killings, the Nebraska prohibition against consideration of non-capital homicide likely licensed a wholesale jury stampede to convict on the basis of the killings, rather than a thoughtful sifting of the subtle but legally determinative nuances of felony murder *mens rea* theory. Whereas the *Beck* jury was likely divided and the verdict compromised, the *Reeves* jury was surely *wholly mistaken*. *Cf. Gerlaugh v. Stewart*, 1997 WL 680072 (9th Cir. November 7, 1997)(Where evidence of intoxication was extremely weak and the evidence of intent to kill, rob, and kidnap was overwhelming, Arizona trial judge's refusal under Arizona law to give a lesser included instruction of capital felony murder had no substantial or injurious effect on the verdict).

B. The Nebraska Supreme Court has not understood *Reeves v. Hopkins* to require a revision of its capital murder statute or Nebraska judges to give lesser included instructions where the law does not so permit. Rather, Nebraska has understood *Reeves v. Hopkins* to require the state to justify its prohibition on some constitutional basis and has restricted *Reeves* to capital cases.

In *State v. Price*, 252 Neb. 365, 562 N.W. 2d 340 (1997), the Nebraska Supreme Court refused to apply *Reeves* in a case where the defendant was not ultimately sentenced to

death. The court characterized the holding in *Reeves* thus:

> *Reeves* found nothing "necessarily unconstitutional" with the definition of mental culpability required in Nebraska for a felony murder conviction [citation omitted]. However, the Eighth Circuit concluded that "the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life".

Id. at 252 Neb. at 372, 562 N.W. 2d at 346. The Nebraska Supreme Court thus clearly does not read *Reeves* to mean that its capital felony murder statute is unconstitutionally defective.

Nor does the Nebraska Supreme Court read *Reeves* to require Nebraska trial judges to administer lesser included instructions where Nebraska's capital felony murder statute and caselaw would not permit it. Rather, it understands *Reeves* to preclude the state from *justifying* its capital felony murder statute on the unconstitutional basis that it requires no showing of intent to kill or reckless indifference to human life. *See Enmund v. Florida*, 458 U.S. 782 (1982) *cited in Reeves*, 102 F.3d at 984-85. Nebraska may prosecute under its capital felony murder statute, thus risking running afoul of *Beck*, *but it must be able to justify its practice on some*

constitutional basis. *Cf. Spaziano* (that a jury would be "tricked" into believing that lesser included offenses were available when they were not was a constitutional basis to refuse to give lesser included instructions); *Hopper v. Evans*, 456 U.S. 605 (1982)(that there was insufficient evidence to support any lesser included instruction was a constitutional basis to refuse to give lesser included instructions). *See also Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir. 1990)(*en banc*)(*Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction).

C. The Nebraska common law roots of its view that there are no lesser included offenses of felony murder reveal that it is not a *per se* rule. Both the State and the Solicitor General acknowledge that first degree sexual assault and involuntary manslaughter qualify as lesser included crimes under Nebraska law.

In reiterating that Nebraska has long held the view that there are no lesser included offenses of felony murder, the Nebraska Supreme Court in *State v. Reeves*, 216 Neb. 206, 216, 344 N.W.2d 433, 442 (1984)("*Reeves* I") cited three Nebraska cases--*State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982), *State v. Bradley*, 210 Neb. 882, 317 N.W. 2d 99 (1982) and *State v. Montgomery*, 191 Neb. 470, 215 N.W. 2d 881 (1974). None are capital cases and do not therefore implicate the Eighth Amendment considerations that prompted this Court to decide *Beck*. *Montgomery*, the earliest case, upheld the trial court's refusal to give a second degree murder or manslaughter instruction in a felony murder

prosecution. But the court stated:

> This is not to say, of course, there might not occur a set of facts under which an instruction on the lesser offense of second degree murder or manslaughter might not be appropriate. Such a situation might be under circumstances where there is a time lag between an assault clearly complete which results in death and the robbery, and where the evidence justifies the conclusion that the robbery indeed was an afterthought and the assault itself was not the direct means of perpetrating the robbery.

Id., 191 Neb. at 473, 215 N.W. 2d at 883 (1974). The rule in Nebraska is that felony murder "*ordinarily*" admits of no lesser included offenses.

First degree sexual assault qualifies as a lesser included offense of capital felony murder-sexual assault under the Nebraska (and federal) "elements" test. *See State v. Williams*, 503 N.W.2d 561, 565 (Neb. 1993)(overruling a line of decisions adopting the "cognate-evidence" test); *Schmuck v. United States*, 489 U.S. 705, 716 (1989)(adopting the "elements" test). *Indeed, both the State and the Solicitor General in their briefs before this Court acknowledge as much. See* Pet. Br. at 32 n. 28; *Amicus* Br. for the United States at 19 n. 13, *citing State v. Nissen*, 560 N.W.2d 157, 178-79 (Neb. 1997)(burglary is a lesser-included offense of felony murder-burglary); *Schmuck*, 489 U.S. at 718 (under the test used in federal courts for determining which offenses are

"necessarily included" within the meaning of Fed. R. Crim. P. 31(c), predicate felonies are lesser-included offenses of felony murder). The felony murder prohibition at issue in this case thus violates Nebraska's own law of lesser included crimes.

Moreover, as the Solicitor General acknowledges, while Nebraska has not specifically addressed whether "unlawful act" manslaughter is also a lesser included offense of felony murder-sexual assault, *see Amicus* Br. for the United States at 13-14 n. 8, the Solicitor General rightly concedes that "unlawful act" manslaughter meets the Nebraska (and federal) "elements" test because a defendant who committed felony murder necessarily would have caused death while in the commission of some unlawful act. *Id.* at 21 n. 15.

D. Whether this case presents this Court with a mandatory state prohibition against instructing on a lesser included crime that did exist under federal and Nebraska law or whether it presents this Court with a blanket state prohibition, *Beck* requires reversal.

Reeves was thus entitled to an instruction on *some* offense short of one calling for his death, even if not fully faithful to his theory of defense, *see Shad v. Arizona*, 501 U.S. 624 (1991). If Nebraska prohibits a lesser included instruction, Reeves was entitled to reversal of his conviction as unconstitutionally unreliable under the Eighth Amendment. Since Nebraska law did not permit an instruction on second degree murder, *see State v. Price*, 252 Neb. 365, 562 N.W. 2d

340, 346 (1997), and since Reeves' confession to the facts underlying the homicides precluded an instruction on first degree sexual assault, *see State v. Huebner*, 513 N.W.2d 284, 292-93 (Neb. 1994)(jury should not be instructed as to lesser included offense unless "the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense"); *Keeble v. United States*, 412 U.S. 205 (1973)(evidence sufficient for a lesser included instruction must be such as to acquit of the greater offense and rationally find guilt as to the lesser), Reeves was entitled to have the jury instructed on "unlawful act" involuntary manslaughter.[7] *Cf. State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994)(trial court was not required to consider lesser included offense of manslaughter in bench trial of defendant on charge of felony murder where the fact finder was not presented with the death penalty or acquit situation and defendant received sentence of life imprisonment). This theory, untested to date by Nebraska

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[7]Neb. Rev. Stat. § 28-304. **Manslaughter; penalty**.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

"Unlawful act" involuntary manslaughter does not require that the defendant have intended death to occur as a result of his unlawful act. *See* Neb. Rev. Stat. § 28-305(1)(1995).

under a *Beck* analysis, would permit the jury to believe both Reeves' intoxication defense (of which there was overwhelming evidence) and also believe that he had committed some unlawful act short of attempted or actual sexual penetration (of which the evidence was inconclusive). And, an instruction on involuntary manslaughter would present no obstacle to Nebraska's lesser included "elements" test, since it, like felony murder, contains no element of intent to kill. *See Reeves v. Hopkins*, 102 F.3d at 984; *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1984)(difference between second degree murder and manslaughter is absence of malice).

Thus, this case either presents this Court with a mandatory state prohibition against instruction on a lesser included crime where a lesser included offense did exist and was supported by the evidence, or it presents this Court with a blanket state felony murder prohibition in a capital case that necessarily yielded an unreliable conviction under the Eighth Amendment. Either way, *Beck* governs and Reeves' sentence of death must be vacated.

E. The impact of an affirmance in this case on state law would be slight. Only three states, other than Nebraska and Arizona, incorporate felony murder into their capital statutes and have also held that some crimes are not lesser included offenses of felony murder.

Of the thirty-eight states that currently have death penalty statutes, only Illinois, Washington and Wyoming (other than the states at issue in this case) incorporate

common law felony murder into their capital murder statute and also hold that some other crimes are not lesser included offenses of felony murder.[8] In the other states, there is either no prohibition, *see, e.g.*, Cal. Penal Code § 190.3 (1988); *People v. Neely*, 6 Cal. 4th 877, 864 P.2d 460 (1993)(no substantial evidence warranting lesser included offenses of second degree murder or voluntary manslaughter); Ind. Stat.

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[8]*See* Ill. Comp. Stat. Ann. ch. 720, § 5/9-1(1993); *People v. Harper*, 279 Ill. App.3d 801, 665 N.E.2d 474 (1996)(in felony murder case stemming from deaths of two people in arson fire, trial court properly refused to instruct on offense of involuntary manslaughter since intent was not element of charge of felony murder); Wash. Rev. Code Ann. § 9A.32.030 (1988); *State v. Dennison*, 115 Wash. 2d 609, 801 P.2d 193 (Wash. 1990)(first and second degree manslaughter were not lesser included offenses of first degree felony-murder, since both require proof of specific mental elements that are not required to prove first degree felony murder); Wyo. Stat. Ann. § 6-2-101(1977); *Richmond v. State*, 554 P.2d 1217 (Wyo. 1976) (manslaughter is not an offense necessarily included in robbery and therefore is not a lesser included offense of the crime of felony murder); *Jansen v. State*, 892 P.2d 1131, 1139 (Wyo. 1990)("a bright line rule is appropriate in the context of felony murder, and the statutory definition does not logically permit the giving of any instruction on any lesser included offense with respect to felony murder ... .").

Ann. § 35-42-1-1 (1986); *Hopkins v. State*, 582 N.E.2d 345 (Ind. 1991)(felony murder defendant was not entitled to instructions on lesser included offenses of reckless homicide or criminal recklessness absent evidence that killing was an act of recklessness) or the issue has not arisen in the context of a capital case.

Thus, contrary to the dire predictions of the Petitioner, *see* Pet. Br. at 30-33, the Solicitor General, *see Amicus* Br. for United States at 22- 28, and the attorney general *Amici*, *see Amicus* Br. for selected states' attorneys general at 13-19, an affirmance in this case would have little impact on the states' prerogative to fashion their own criminal jurisprudence. Yet an affirmance is mandated by *Beck*.

II.

DOES THE OPINION OF THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS*, 102 F.3d 977 (8th CIR. 1996) CREATE A DIRECT CONFLICT WITH THE NINTH CIRCUIT IN *GREENAWALT v. RICKETTS*, 943 F.2d 1020 (9th CIR. 1991)?

A. There is no split between the Eighth and Ninth Circuits. The Ninth Circuit merely misapplied *Spaziano v. Florida*, 468 U.S. 447 (1984).

In *Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991), the Ninth Circuit, in a two-paragraph discussion, held that since Arizona law recognized no lesser included

offenses to felony murder, this Court's holding in *Spaziano v. Florida*, 468 U.S. 447 (1984) foreclosed the defendant's *Beck* claim. In *Reeves v. Hopkins*, 102 F.3d 977, 983 (8th Cir. 1996), the Eighth Circuit held that *Spaziano* does not limit *Beck*, and that the Ninth Circuit had read *Spaziano* "too broadly".

In *Spaziano*, the defendant refused to waive the statute of limitations which prevented the trial judge from instructing on lesser included offenses of capital murder. In response to his later claim that jury's all-or-nothing choice between conviction and acquittal violated *Beck*, this Court held that a jury may not be instructed that it has a choice of crimes when any such choice is barred by state law. *Id.*, 468 U.S. at 456.

The *Reeves* court correctly understood *Spaziano* to be an exception to *Beck* rather than the logical extension represented by such post-*Beck* cases as *Hopper v. Evans*, 456 U.S. 605, 611 (1982)(holding that *Beck* requires instructions on noncapital offense only when the evidence would support a conviction on that charge) and *Enmund v. Florida*, 458 U.S. 782, 801(1982)(requiring that before a state may impose the death penalty, there must be a finding that the defendant was both a major participant in the killing and that he or she had acted with reckless indifference to human life). That exception would apply only when an instruction would mislead a jury into believing that it had a choice among offenses when it did not. *Reeves*, 102 F.3d at 984. Since Nebraska's refusal to recognize any lesser included offenses of felony murder operated in Nebraska's capital murder statute to confront a jury with the same all-or-nothing choice

proscribed by *Beck* --and not an affirmative misrepresentation of state law--the *Reeves* court found that *Spaziano* did not apply.

The *Greenawalt* court, by contrast, perfunctorily concluded that *Spaziano* held that whenever state law does not recognize any lesser included offenses of a capital crime, a defendant is not entitled to the "third option" required by *Beck*. *Greenawalt*, 943 F.2d at 1029.

B. This Court need only clarify that *Spaziano* is limited to cases of affirmative misrepresentation of state law and not to cases otherwise governed by *Beck* in which state law operates to proscribe instruction on lesser included offenses.

This Court need only clarify that *Beck* was not concerned with any of a variety of possible ***causes*** of a jury dilemma but rather with the likely ***effect*** of those causes on the integrity of the deliberative process. A trial judge may not mislead a jury that lesser included offenses exist when, for any number of reasons, they do not; but neither, under Beck, may state law operate to force an unconstitutional dilemma between conviction of a capital offense and acquittal.

III.

DID THE EIGHTH CIRCUIT IN *REEVES v. HOPKINS* ANNOUNCE A "NEW RULE" UNDER *TEAGUE v. LANE*, 489 U.S. 288 (1989)?

A. The State has waived any *Teague*[9] argument.

This Court has declined to date to entertain a *Teague* claim raised for the first time in a petition for writ of *certiorari*, *see Schiro v. Farley*, 510 U.S. 222 (1994); *see also Godinez v. Moran*, 509 U.S. 389, 393 n.8 (1993)(same). Rather, this Court has minimally required a party to raise a potential *Teague* bar at whatever stage in the federal habeas proceedings the party claiming the benefit of *Teague* was on notice that a "new" issue has been raised. *See Goeke v. Branch*, 514 U.S. 115 (1995)(where the state cited *Teague* in the district court but the petitioner raised a new ground for affirmance for the first time in the court of appeals, the state was held not to have waived its *Teague* objection to the new ground). All of the courts of appeals since *Schiro* have declined to address a *Teague* claim that was not raised in the district court. *See, e.g.*, *Wilmer v. Johnson*, 30 F.3d 451, 455

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[9]*See Teague v. Lane*, 489 U.S. 288 (1989)(holding that federal habeas corpus is not available to state prisoners who want to assert rights that they could not have asserted in their criminal proceedings in state court because the rights had not yet been declared.)

(3d Cir. 1994); *Duckett v. Godinez*, 67 F.3d 734, 746 n. 6 (9th Cir. 1995).

While it is possible to interpret *Goeke* three ways--a *Teague* claim is sufficiently preserved if raised for the first time in the court of appeals; or if raised at the time a "new rule" is sought; or if raised for the first time on appeal if first presented to the district court with respect to some issue, *see Eaglin v. Welborn*, 57 F.3d 496, 498 (7th Cir. 1995)--*none* of these interpretations would countenance the state's dereliction in this case. There was no lack of opportunity to raise a *Teague* objection: Reeves raised the *Beck* issue at every stage of both his state and federal proceedings. Moreover, the need for flexibility regarding possible waiver in cases involving considerations of comity, *see, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Younger v. Harris*, 401 U.S. 37, 40-41 (1971), is absent in this case since the Nebraska Supreme Court was twice invited to address the *Beck* issue and declined to do so. *See* Pet. Br. at 39 n. 36.

Finally, this Court and the lower courts have consistently held, following *Teague*, that the burden of asserting nonretroactivity belongs to the state and not to the federal courts *sua sponte*. *See, e.g., Casper v. Bohlen*, 510 U.S. 383 (1994)("We have recognized that the nonretroactivity doctrine is not 'jurisdictional' in the sense that [federal courts] ... must raise and decide the issue *sua sponte*" and " a federal court may, but need not, decline to apply *Teague* if the State does not argue it" (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)); *Myers v. Collins*, 8

F.3d 249, 252 n. 7 (5th Cir. 1992)(although "it could be argued that the holding announced today is a 'new rule' and ... barred ... by *Teague v. Lane*" state waived nonjurisdictional *Teague* defense by failing to raise issue); *Epperly v. Booker*, 997 F.2d 1, 9 n. 7 (4th Cir. 1993)(state waived *Teague* defense be failing to raise it in district court and raising it for first time on appeal). *See generally* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 25.3 (2d ed. 1988).

B. The Eighth Circuit in *Reeves v. Hopkins* did not create a "new" rule; rather, it merely applied *Beck* and its progeny to a case on all fours with *Beck*.

While this Court has invited the parties in this case to address the due process question of whether *Beck* requires a state to instruct on a lesser included offense where state law appears to forbid such an instruction, *Amicus* has argued in part II of this brief that this Court may and should resolve this case without creating a "new" rule itself. Inevitably, however, whether this Court determines that it must create new law in this case depends upon its reading of the Eighth Circuit's holding in *Reeves* and whether a "new" rule was established therein.

There are two reasons why the Eighth Circuit did not create a "new" rule in *Reeves*. First, the Eighth Circuit held only that the Nebraska felony murder prohibition could not be applied in a capital case. *See id.*, 102 F.3d at 985. It did *not* hold that Nebraska's statute was unconstitutional as offending due process, *see id.*, 102 F.3d at 984 ("We do not suggest that

the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*"), nor did it require, as the State and the Solicitor General urge, *see* Pet. Br. at 18, *Amicus* Br. for United States at 8-9, that Nebraska draft some new set of laws to conform to *Beck*. It merely applied precedent current as of the date Reeves' conviction became final[10] for the second time in a capital case.[11]

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[10]There is no disagreement that this date was April 20, 1984.

[11]Although the courts of appeals have confronted *Beck* issues in approximately 108 cases since 1980, the vast majority were resolved upon with a finding that the evidence would not have supported the requested lesser included instruction. *See, e.g., Hatch v. State of Oklahoma*, 58 F.3d 1447 (10th Cir. 1995)(insufficient evidence of lesser included of first degree murder); *Williams v. Armontrout*, 912 F.2d 924 (8th Cir. 1990)(no separate kidnaping occurred, so no underlying felony was present to justify giving felony murder as a lesser included).

In only three cases to date have the courts of appeals confronted the problem of a state law prohibition on lesser included instructions where the evidence would have warranted them. All were non-capital cases. *See Jones v.*

Since *Teague v. Lane* was decided, this Court has defined a "new" rule of law in a variety of ways. *See Teague*, 489 U.S. at 301 (a rule is new if it "breaks new ground or imposes a new obligation on the States" or, put another way, was not "dictated by precedent existing at the time the defendant's conviction became final"); *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989)(rule petitioner invoked was not new as petitioner was only asking "to fulfill the assurance" upon which earlier cases were based); *Butler v. McKellar*, 494 U.S. 407, 415 (1990)(rule was new when it was "susceptible to debate among reasonable minds"); *Saffle v. Parks*, 494 U.S. 484, 488 (1990)(task is to determine whether a state court considering claim at the time conviction became final "would have felt compelled by existing precedent to conclude that the rule" now invoked was required by the Constitution); *Stringer v. Black*, 503 U.S. 222, 237 (1992)(whether rule is dictated by precedent is an "objective" inquiry not to be governed by whether all lower courts agree). *See also Wright v. West*, 505 U.S. 277, 304 (1992)(O'Connor, J. concurring)(if a "proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which

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Thigpen, 741 F.2d 805 (5th Cir. 1984)(reading *Spaziano* to limit the applicability of *Beck* to capital cases where state law establishes lesser included offenses); *Castillas v. Scully*, 769 F.2d 60 (2d Cir. 1985)(under New York law, criminal facilitation was not a lesser included of felony murder, so no instruction warranted); *Hill v. Kemp*, 833 F.2d 927 (11th Cir. 1987)(federal court must adhere to state law determination that statutory rape was not a lesser included of forcible rape).

the precedent's underlying principle applies, the distinction is not meaningful"; at 308 (Kennedy, J. concurring)(when the "rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule"). Affirming the Eighth Circuit's judgment does not depend upon choosing among any of these formulations, however, because the *Reeves* holding was not "new" under any of these formulations. The Eighth Circuit merely applied *Beck*, which was firmly in place at the time of Reeve's trial, to a state rule that, like the statute in *Beck*, flatly prohibits instructing a jury on lesser included offenses in capital cases.

Second, and more broadly, the purportedly "new" rule in this case was announced on appeal as a resolution of Reeves' *own* habeas action. This is not a case, like all other post-*Teague* cases, in which a habeas petitioner seeks to rely on some decision of this Court decided after his or her conviction became final. *See, e.g., O'Dell v. Netherland*, 117 S. Ct. 1996 (1997)(rule in *Simmons v. South Carolina* requiring that a capital defendant be permitted to inform the sentencing jury of his parole-ineligibility if the prosecution argues future dangerousness was "new"); *Lambrix v. Singletary*, 117 S. Ct. 1517 (1997)(rule in *Espinosa v. Florida* was "new" and could not be retroactively applied). Not surprisingly, this Court has concluded in such cases that the intervening Supreme Court decision was a "new" rule which the Court refused to apply retroactively. Nor is this a case, like *Gilmore v. Taylor*, 508 U.S. 333 (1993), in which a habeas petitioner seeks to take advantage of a favorable

decision *in another case in his own circuit* decided after his conviction has become final, for the *Teague* doctrine generally seems to operate to preempt *stare decisis* in habeas cases. Rather, Reeves seeks the benefit of the resolution of his own habeas petition as to which the Eighth Circuit's opinion is binding precedent. While this Court may not approve of that precedent, the vehicle for registering that disapproval is not *Teague* but rather the granting of a petition for writ of *certiorari* on grounds specified in S. Ct. R. 10.

Thus, because the state has waived its *Teague* objection by not raising it in the district court; because the Eighth Circuit was acting merely as a lower court applying established precedent of this Court to an set of facts nearly identical with those presented in *Beck;* and because that precedent is binding in Reeves' habeas case unless this Court reverses the holding on the merits, *Teague* does not apply.

CONCLUSION

Based upon the arguments and citations of authority of the respondent and the *amicus*, it is respectfully requested that this Court affirm the Eighth Circuit's decision in *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996).

Respectfully submitted,

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